

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5385 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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LILABEN SHIRISHBHAI PATEL

Versus

UPENDRABHAI JETHABHAI                      THROUGH POA BABUBHAI

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Appearance:

MRS KETTY A MEHTA for Petitioner  
MR S TRIPATHY for Respondent No. 1  
MR GIRISH M PARIKH for Respondent No. 2

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CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 23/07/98

ORAL JUDGEMENT

Heard ld. counsel Mrs. K.T. Mehta for the petitioner, ld.counsel Mr. S.Tripathi for respondent no.1 and ld. counsel Mr. G.M. Parikh for respondent no.2.

Rule. Ld. counsel Mr. S. Trpathi waives service of rule for respondent no. 1 and ld. counsel Mr. G.M.Parikh waives service of rule for respondent

no.2. Ld. counsel Mrs. Mehta states that she does not seek any relief against respondent no.3 and requested to permit her to delete respondent no.3 and submitted that she will amend the petition accordingly. Permission is granted. Respondent no.3 is deleted.

At the request of ld. counsel appearing for the respective parties, this matter is taken up for final hearing today.

Ld. counsel appearing for the respective parties have taken this court through details and background of the case. However, the question before this Court is very limited and upon a query, ld. counsel appearing for the respondents fairly conceded to the position that in view of the provisions of sub-rule (1) & (3) of O.23 of the C.P.Code, ld. concerned Judge ought to have accepted the application tendered by the petitioners and the same ought to have been decided on merits after hearing the parties.

On this issue, ld. counsel Mrs. Mehta has relied upon a decision in the case of Banvarilal v/s Smt. Chando Devi ( through L.R.) and another, reported in AIR 1993 SC 1139, wherein the Apex Court analysed the contingencies where the party approaches the Court to get the decree set aside by the Civil Court in which a compromise has been arrived at. Relevant observations are in para-7 which reads as under :-

"7. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the Court which had recorded the compromise in question. This Court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said Rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by R.3A in respect of institution of a separate suit for setting aside a decree on basis of compromise saying :-

"3A. Bar to suit- No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

As per amended Rule 3A of O.23 of C.P.Code, it creates embargo against a party and this barring

provision had led the present petitioner to approach the same Civil Judge to agitate the grievance that a fraudulent or otherwise voidable compromise has been entered into by the power of attorney holder. It is not in dispute that at one point of time, respondent no.2 was acting as a power of attorney of the present petitioner. It is observed by the Appex Court that earlier under O.43 R.1(m), an appeal was maintainable against an order under R.3 of O.23 recording or refusing to record an agreement, compromise or satisfaction. The Appex Court, in the aforesaid judgment, further observed as under :-

" Being conscious that the right of appeal against the order recording a compromise or refusing to record a compromise was being taken away, a new Rule 1A has been added to O.43 which is as follows:-

"1A Right to challenge non-appealable orders in appeal against decrees--

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded."

The Appex Court, in para-14 further observed and held as under :-

" .....If the agreement or the compromise itself is fraudulent, then it shall be deemed to be void within the meaning of the explanation to the proviso to r.3 and as such not lawful. The learned Subordinate Judge was perfectly justified in entertaining the application filed on behalf of the appellant and considering the question as to whether there had been a lawful agreement or compromise on the basis of which the Court could have recorded such agreement or compromise...."

In the instant case, it is amply established by the present petitioner that after alleged compromise, he

had rushed to the very Court and had applied under the relevant provisions of R.3 of O.23 and the ld. Judge has not even cared to accept that application.

When the application under R.3 of O.23 of the C.P.Code was presented before the ld. Civil Judge, he has not even cared to accept the same and returned it to Mr. Thakore, ld. counsel appearing for the petitioner. This fact is specifically stated in the petition and the same is supported on oath. Mrs. Mehta stats that original application is still with her which was returned to ld. counsel Mr. Thakore.

The above facts clearly indicates that the ld. Judge has failed to accept and entertain application tendered before him under R.3 of O.23 of C.P. Code and, therefore, in view of the decision of the Appex Court referred to above, this matter requires to be disposed of by giving appropriate directions to the ld.concerned Judge to accept and entertain the application, if tendered, afresh and dispose of the same on merits and in accordance with law. Before parting, I would like to observe that act of returning of application which is tendered to a Judicial Officer without assigning reasons, is not just and proper.

Ld. counsel appearing for the parties have fairly agreed that all concerned parties should maintain status quo so far as the suit property is concerned.

Every Judicial Officer, when application under the provisions of C.P.Code or under any other procedural Law is presented, the same should be dealt with in accordance with law. Returning original application to the party concerned or to the advocate is not a proper practice on the part of a Judicial Officer.

In the result, ld. Civil Judge (S.D) Bharuch presiding officer of the Court wherein Special Civil Suit No. 133/94 was pending on the day of the alleged compromise or his successor in office, is directed to accept and entertain the application, if tendered by the petitioner under R.3 of O.23 of C.P.Code and decide the same on merits and in accordance with law. It is further directed that till the said application is finally disposed of, parties shall maintain status quo qua the suit property. Rule is made absolute. No order as to costs.

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